

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Infinity Radio Operations, Inc.)	File No. EB-02-IH-0624-GC
)	NAL/Acct. No. 200332080020
Licensee of Station WBLK(FM),)	FRN 0004036711
Buffalo, New York)	Facility ID # 71215

ORDER ON REVIEW

Adopted: May 17, 2007

Released: May 24, 2007

By the Commission:

I. INTRODUCTION

1. In this *Order on Review*, we grant in part and deny in part an Application for Review filed by Infinity Radio Operations, Inc. (“Infinity”).¹ On August 12, 2004, the Enforcement Bureau (“Bureau”) imposed a \$4,000 forfeiture on Infinity for violating section 73.1206 of the Commission’s rules² by broadcasting a telephone conversation without first informing the other party to the conversation of its intent to do so.³ The Bureau denied Infinity’s Petition for Reconsideration, and the present *Application* challenges that *Reconsideration Order*.⁴ We reject Infinity’s contention that the forfeiture should be cancelled or reduced because the Bureau referred to an unpaid, non-final forfeiture order against another Infinity affiliate in a prior proceeding to rebut Infinity’s claim that this was an isolated incident. We grant in part, however, Infinity’s request to cancel or reduce the forfeiture because of its pre-investigation corrective measures and reduce the forfeiture to \$3,000.

II. BACKGROUND

2. Infinity, licensee of Station WBLK(FM), Buffalo, New York, admits that on June 26, 2002, WBLK(FM) broadcast a telephone conversation between one of its on-air personalities, Shae Moore, and Brenda Tanner, while the latter was working as a telephone customer service representative of Adelphia Communications, Inc., without informing her of the intent to broadcast the conversation.⁵ In imposing the base forfeiture amount for this admitted violation, the Bureau cited another forfeiture order, issued for Infinity’s violation of section 73.1206 in a previous proceeding concerning a different Infinity station, to rebut Infinity’s claim in the present proceeding that this was an isolated incident. The previous forfeiture order has not been paid or finally adjudicated in district court, and Infinity now argues that the

¹ Infinity Radio Operations, Inc., Application for Review, filed on March 28, 2005 (“*Application*”).

² 47 C.F.R. § 73.1206.

³ See *Infinity Radio Operations, Inc. (WBLK(FM))*, Forfeiture Order, 19 FCC Rcd 15460 (Enf. Bur. 2004) (“*Forfeiture Order*”); see also *Infinity Radio Operations, Inc. (WBLK(FM))*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 16191 (Enf. Bur. 2003) (“*NAL*”).

⁴ *Infinity Radio Operations, Inc. (WBLK(FM))*, Order on Reconsideration, 20 FCC Rcd 4028 (Enf. Bur. 2005) (“*Reconsideration Order*”).

⁵ *Application* at 2. See also *NAL*, 18 FCC Rcd at 16191, ¶ 2.

Bureau's use here of the underlying facts from that prior proceeding violates section 504(c) of the Communications Act of 1934, as amended ("the Act").⁶ In particular, Infinity notes that the applicable five-year statute of limitations on enforcement of that prior forfeiture order pursuant to section 504(a) of the Act⁷ has now expired and that the Bureau's subsequent use of those underlying facts in the present proceeding, without Infinity's having had a fair hearing to litigate them, undermines the effect of the limitations provision.

3. Infinity also disputes the Bureau's rejection of its claim that the forfeiture amount should be reduced or cancelled because the Bureau failed to take into account Infinity's good faith efforts to comply both before and after the broadcast call. Infinity cites several other cases in which it claims that the Bureau has granted such relief under similar circumstances and argues that the Bureau must explain this disparate treatment.

III. DISCUSSION

A. Infinity Violated the Telephone Broadcast Rule

4. The facts of this case are undisputed. By Infinity's own admission, Shae Moore, a WBLK(FM) personality, broadcast a telephone conversation with Brenda Tanner, an Adelphia customer service representative, without first notifying Ms. Tanner of her intention to broadcast the conversation. According to Ms. Tanner's complaint, which Infinity does not dispute, Ms. Moore posed as an Adelphia customer and did not reveal that the conversation would be on the air. She began the conversation by asking if Adelphia, which had recently declared bankruptcy, really was bankrupt. When Ms. Tanner confirmed the bankruptcy, Ms. Moore then asked several times if she still had to pay her cable bill. Ms. Tanner repeatedly told Ms. Moore that she had to do so, and referred her to Adelphia's web site and another phone number. Ms. Moore then asked if she could "bootleg" cable, to which Ms. Tanner reminded Ms. Moore that such behavior was illegal. Ms. Moore then asked Ms. Tanner if she was going to lose her job, and laughed when Ms. Tanner said she hoped not. At that point, Ms. Tanner told Ms. Moore that unless she had any real cable questions, she would end the call. After Ms. Moore continued in this vein, Ms. Tanner hung up the call. A few minutes later, Ms. Tanner received a call from an off-duty co-worker, who told her that her conversation with Ms. Moore was on the air.

5. According to Infinity, the station suspended Ms. Moore without pay. It also reiterated its written policy to all station employees against airing or recording telephone conversations without permission.

B. The Forfeiture Order Did Not Violate Section 504(c) or the Statute of Limitations

6. Rather than disputing whether it violated the telephone broadcast rule, Infinity focuses on the propriety of the forfeiture in this case. In issuing the forfeiture, the Bureau noted that this incident was not the first Infinity violation of the telephone broadcast rule. In imposing the base forfeiture amount of \$4,000 for violation of section 73.1206, the Bureau rejected Infinity's prior claim that the broadcast was an "isolated incident" by citing another proceeding, *EZ Sacramento*,⁸ in which the Commission

⁶ 47 U.S.C § 504(c). Section 504(c) generally prohibits use of the fact that the Commission has issued a notice of apparent liability for forfeiture (NAL) in another Commission proceeding to the detriment of the person to whom the notice was issued, unless that NAL has either been paid or finally adjudicated in a district court trial *de novo*.

⁷ 47 U.S.C § 504(a). Section 504(a) provides that recovery of a forfeiture under the Act shall be by trial *de novo* in a civil suit in United States district court.

⁸ *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 4958 (2001) (denying application for review of denial of petitions for reconsideration of forfeiture orders) ("*EZ Sacramento*"); *recon. dismissed*, 16 FCC Rcd 15605 (2001).

assessed a forfeiture against another Infinity affiliate for similar conduct in violation of section 73.1206.⁹ Infinity now argues, as it did in the Petition for Reconsideration,¹⁰ that the *Forfeiture Order* should be reversed and the forfeiture cancelled or reduced because the Bureau's reference in the *Forfeiture Order* to *EZ Sacramento*, which forfeiture has neither been paid nor finally adjudicated by a court, violates section 504(c) of the Act.¹¹ Section 504(c) provides:

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

7. In the *Reconsideration Order*, the Bureau rejected Infinity's similar section 504(c) argument because the reference to *EZ Sacramento* was only to the underlying facts of similar conduct to assess Infinity's claim of no prior offenses, rather than for the existence of the contested notice of apparent liability as such.¹² The Bureau noted that this practice was specifically held permissible in a rulemaking proceeding on that very issue¹³ and was consistent with Congressional intent as reflected in the legislative history of section 504(c).¹⁴ Referring to the rulemaking, the Bureau observed that the main policy reason for section 504(c) was to ensure that no party would be penalized for challenging an NAL rather than paying it. Accordingly, the Bureau stated, the facts underlying the prior order remain available for other appropriate purposes, such as to resolve whether the licensee is engaging in a pattern of non-compliant behavior.¹⁵

8. In the *Application*, Infinity now contends that the Bureau's interpretation in the *Reconsideration Order* is inconsistent with the plain language of section 504(c) because the statute makes no distinction between use of the facts underlying an NAL and use of the existence of the NAL *per se*.¹⁶ Infinity claims that in the face of this explicit language, arguments concerning legislative intent cannot trump the plain language of the statute.¹⁷

⁹ *Forfeiture Order*, 18 FCC Rcd at 15461, ¶¶ 5-6.

¹⁰ Infinity Radio Operations, Inc., Petition for Reconsideration, filed on September 13, 2004 ("*Reconsideration Petition*"), at 3-6.

¹¹ *Application* at 4-7 (citing 47 U.S.C. § 504(c)).

¹² *Reconsideration Order*, 20 FCC Rcd at 4030-31, ¶¶ 7-8. In its *Reconsideration Petition*, Infinity had argued that the distinction between use of the NAL *per se* and use of the NAL's underlying facts was meaningless because they both have "the same punitive effect." See *Reconsideration Order*, 20 FCC Rcd at 4030, ¶¶ 6-7.

¹³ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17102-04, ¶¶ 32-36 (1997); *on recon.*, 15 FCC Rcd 303, 303-05, ¶¶ 3-5 (1999) ("*Forfeiture Policy Statement Reconsideration Order*").

¹⁴ *Reconsideration Order*, 20 FCC Rcd at 4030-31, ¶ 8 (citing 106 Cong. Rec. 17623 (Aug. 25, 1960); S. Rep. No. 1857, 86th Cong., 2d Sess. at 10-11 (1960)). We note that Infinity had adequate opportunity to address this issue and did so. *Forfeiture Policy Statement Report and Order*, 12 FCC Rcd at 17102, ¶ 32 (1997).

¹⁵ *Id.*, 20 FCC Rcd at 4030, ¶ 7 (citing *Forfeiture Policy Statement Reconsideration Order*, 15 FCC Rcd at 304, ¶ 3).

¹⁶ *Application* at 5-6.

¹⁷ *Id.* at 5 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (in determining whether the term "employee" in a Title VII action includes former employees, the inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent)).

9. We reject Infinity's argument that the plain language of section 504(c) unambiguously excludes use of the facts underlying a previous unpaid, unadjudicated forfeiture order. The statute states that where the Commission has issued an NAL, "*that fact* shall not be used in any other [Commission] proceeding. . . ." to the party's prejudice unless it has been paid or become final.¹⁸ The provision's specific reference to "*that fact*," *i.e.*, the NAL's issuance, indicates that it is the existence of the NAL *per se* that may not be used. There is nothing in the statutory language indicating that the facts underlying the NAL cannot be used in another Commission proceeding. Moreover, this reading of the statute is confirmed by explicit language in the Senate Report:

[Section 504(c)] is not intended to mean that the facts upon which a notice of forfeiture liability against a licensee is based cannot be considered by the Commission in connection with an application for renewal of a license, for example, or with respect to the imposition of other sanctions authorized by the Communications Act of 1934¹⁹

Accordingly, we find that the language and intent of section 504(c) permits use of the underlying facts from a previous, non-final NAL—that has not been paid or finally adjudicated in district court—in a subsequent Commission proceeding.

10. Infinity asserts a second argument that, notwithstanding its clear violation of the telephone broadcast rule, it should not be subject to forfeiture. It argues in its *Application* that the *Reconsideration Order* undermines the five-year statute of limitations that would be applicable to any section 504(a) final enforcement action for the *EZ Sacramento* forfeiture because that period has already expired.²⁰ It argues that allowing the Government an opportunity to litigate those facts would render the statute of limitations for enforcement of the *EZ Sacramento* forfeiture meaningless.²¹

11. Contrary to Infinity's argument, the reference to *EZ Sacramento* in this case does not render the statute of limitations for enforcement of the *EZ Sacramento* forfeiture meaningless. As the Commission explained in *Eastern Broadcasting Corp.*, citing the Supreme Court's decision in *Machinists Local v. NLRB*, we may consider facts that occur outside the statute of limitations to determine the "degree of culpability" of a violator for violations that occurred within the statute of limitations because such facts "shed light on the true character of matters occurring within the [statute of] limitations period."²² In *Machinists Local*, the Court made clear, in a similar context, that a statute of limitations period barred only the use of facts occurring outside the statute of limitation period when such facts were necessary to show that a violation occurred within the limitations period.²³ That is clearly not the case here. In this case, reference to the prior violation was not necessary to establish that Infinity violated Section 73.1206 of our rules on June 26, 2002, because that violation was willful. Thus, a forfeiture is

¹⁸ 47 U.S.C. § 504(c) (emphasis supplied).

¹⁹ See note 14, *supra*. In the *Reconsideration Order*, the Bureau found that Infinity's *Reconsideration Petition* had misleadingly quoted another, more general excerpt from the Senate Report that merely tracked the language of the statute, while ignoring this relatively specific excerpt. See *Reconsideration Order*, 20 FCC Rcd at 4030-31, ¶¶ 7-8.

²⁰ *Application* at 5-7 (citing *Action for Children's Television v. FCC*, 59 F.3d 1249, 1254 (D.C. Cir. 1995) (the general five-year period of limitations on forfeiture proceedings in 28 U.S.C. § 2462 governs section 504(a) enforcement actions)).

²¹ *Application* at 5-6.

²² *Eastern Broadcasting Corp.*, 10 FCC 2d 37, 38 at ¶ 3 (1967), citing *Machinists Local v. NLRB*, 362 U.S. 411 (1960).

²³ *Machinists Local*, 362 U.S. at 416 (finding that the NLRB could not find an unfair labor practice when "conduct occurring with the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice" occurring outside the limitations period.).

appropriate even if this was an isolated rather than repeated incident.²⁴ Moreover, the \$4,000 forfeiture imposed here was the base forfeiture amount, and was not increased as a result of the prior incident. The *Reconsideration Order* noted that the Forfeiture Order had referenced *EZ Sacramento* only to rebut Infinity's assertion that the forfeiture should be reduced because of its history of compliance.²⁵

12. In sum, we conclude that Section 504(c) of the Act permits reference to the facts underlying a prior unpaid, unadjudicated NAL in a subsequent Commission proceeding. Moreover, we conclude that the reference to those facts in the present case does not undermine the statute of limitations applicable to a section 504(a) enforcement action in the first proceeding or create unfairness in this proceeding.

C. Reduction of the Forfeiture for Infinity's Pre-Investigative Remedial Measures

13. Finally, Infinity claims that we should reduce or eliminate the forfeiture based on its good faith efforts to comply with the telephone broadcast rule. Throughout this proceeding, Infinity has represented that: (1) the actions of its disc jockey, Ms. Moore, were inconsistent with its written policy; and (2) after the incident, it took disciplinary action against her and distributed a memo to all of its WBLK(FM) on-air personalities reiterating that policy.²⁶ Accordingly, Infinity has maintained that the Bureau should have cancelled or reduced the forfeiture because it has done so for good faith efforts to comply in several other comparable cases.²⁷ Moreover, in reliance on *Melody Music v. FCC*, Infinity has argued that the Commission must explain this disparate treatment of similarly situated parties.²⁸

14. In the *Reconsideration Order*, the Bureau rejected this argument, stating that, unlike Infinity, the cited licensees had undertaken substantial steps to comply with various technical broadcasting requirements before actually being notified of a possible violation.²⁹ Moreover, the Bureau noted that the Commission has consistently refused to consider post-investigation remedial measures.³⁰

²⁴ See 47 U.S.C. § 503(b)(1)(B) (forfeiture penalty may be imposed for rule violations that are willful or repeated).

²⁵ See *Reconsideration Order*, 20 FCC Rcd at 4028-29, ¶ 2. Section 1.80 of the Commission's rules states that, in assessing forfeitures, the Commission may consider prior violations of FCC rules and the licensee's history of overall compliance as upward and downward adjustment criteria, respectively. 47 C.F.R. § 1.80.

²⁶ See, e.g., *Reconsideration Petition* at 2, 6-7.

²⁷ *Id.* at 6-7 (citing *American Family Association, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16530 (Enf. Bur. 2003) (forfeiture for failure to maintain local public inspection file cancelled for good faith efforts to comply because the documents were unfiled but at least present at the site before inspection and notification of a possible violation) ("*American Family*"); *Capstar Radio Operating Company*, Forfeiture Order, 19 FCC Rcd 15374 (Enf. Bur. 2004) (forfeiture for failure to display antenna registration reduced for good faith efforts to comply after inspection, but before notification of a possible violation) ("*Capstar*"); *Forrester, et al.*, Forfeiture Order, 19 FCC Rcd 11030 (Enf. Bur. 2004) (forfeiture for failure to enclose antenna tower with fence reduced for good faith efforts to comply because fence was completed soon after inspection, but before notification of a possible violation) ("*Forrester*"); *Aracelis Ortiz, Executrix for the Estate of Carlos Ortiz*, Forfeiture Order, 19 FCC Rcd 2632 (Enf. Bur. 2004) (forfeitures for failure to maintain EAS system and studio in locale reduced for good faith efforts to comply because steps had been undertaken before inspection and notification of a possible violation) ("*Ortiz*").

²⁸ *Id.* at 7 (citing *Melody Music, Inc. v. Federal Communications Commission*, 345 F.2d 730, 732 (D.C. Cir. 1965) ("*Melody Music*").

²⁹ *Reconsideration Order*, 20 FCC Rcd at 4032, ¶ 12 and notes 24 & 26 (citing, *inter alia*, the cases in note 27, *supra*).

³⁰ *Id.* (citing, e.g., *Mid-Missouri Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 22900 (Enf. Bur. 2004) (regarding prank call by on air-radio personality to crisis hotline without prior notification of intent to broadcast, Bureau proposed base forfeiture amount for section 73.1206 violation notwithstanding licensee's claim that this was an "isolated incident" and that it had taken remedial measures approximately two weeks after the

(continued....)

Finally, the Bureau stated that *Melody Music* involved disparate treatment between parties that were far more similarly situated with each other than Infinity is with these cited licensees.³¹

15. Infinity now argues in its *Application* that the fact that the other comparable decisions involved technical regulations is irrelevant and that regulations with public safety implications are, if anything, more serious. Moreover, Infinity notes that two of these cases concerned good faith measures taken after the inspections that uncovered the violations and two others concerned such measures before an inspection.³² Infinity emphasizes that, contrary to the Bureau's statement, it took disciplinary action and distributed the memo the day immediately after the broadcast, which was well before the first actual notice of an investigation by receipt of the Bureau's Letter of Inquiry over a month later.³³ Furthermore, Infinity states for the first time that in addition to having a written policy, it made the requirements of section 73.1206 very clear to its on-air personnel long before the incident. Infinity argues that the Bureau has not explained what more substantial steps it could have taken.³⁴

16. We find that Infinity is correct that its disciplinary action and memo occurred before notice of an investigation.³⁵ Although corrective measures before the licensee is notified of an investigation are not necessarily sufficient to avoid enforcement action,³⁶ we find that, under the circumstances presented here, such measures present a mitigating factor. On the other hand, Infinity's pre-investigative remedial measures cannot undo the damage to Ms. Tanner's legitimate expectation of privacy that section 73.1206 was meant to protect.³⁷ Weighing all these circumstances under the standards of section 503(b)(2)(D) of the Act,³⁸ we reduce the \$4,000 base forfeiture to \$3,000 for Infinity's remedial measures taken prior to learning of this investigation.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED THAT the Application for Review filed on March 28, 2005 by Infinity Radio Operations, Inc. IS GRANTED to the extent discussed above and is otherwise DENIED.

18. IT IS FURTHER ORDERED THAT a copy of this Order on Review shall be sent by Certified Mail Return Receipt Requested to Stephen A. Hildebrandt, Vice President, Infinity Radio

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incident, but before the Bureau notified it of a possible violation well over a year after the incident) ("*Mid-Missouri*").

³¹ *Id.* at ¶ 13.

³² *Application* at 7-10 (citing *Capstar*; *Forrester*; *Ortiz*; *American Family*).

³³ *Id.* at 8-9.

³⁴ *Id.* at 9.

³⁵ See Infinity Radio Operations, Inc., Response to Notice of Apparent Liability, filed on September 4, 2003, at 2.

³⁶ See *Mid-Missouri*, 19 FCC Rcd at 22902-03, ¶ 8.

³⁷ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988).

³⁸ 47 U.S.C. § 503(b)(2)(D).

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FEDERAL COMMUNICATIONS COMMISSION

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